Supreme Court, U.S.
FILED
SEP 14 1985
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No. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,

Petitioner,

v.

CLIFFORD W. CARRIER,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

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BRIEF ON BEHALF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether attorney error based on ignorance or inadvertence, which does not constitute ineffective assistance of counsel in violation of the Sixth Amendment, is sufficient to establish the "cause" required to excuse a procedural default under *Wainwright v. Sykes*, 433 U.S. 72 (1977).

2. Whether the exhaustion requirement of 28 U.S.C. § 2254 may be circumvented merely because a claim of attorney error is asserted to establish "cause" under *Wainwright v. Sykes* rather than as an independent ground for habeas corpus relief.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. ATTORNEY ERROR NOT CONSTITUTING SIXTH AMENDMENT INEFFECTIVENESS OF COUNSEL IS NOT "CAUSE" UNDER *WAINWRIGHT V. SYKES* TO EXCUSE PROCEDURAL DEFAULT	8
A. Prior decisions of this Court compel the conclusion that mere attorney error is not "cause"	8
B. Sound reasons support the conclusion that mere attorney error is not "cause"	14
1. The right to effective assistance of counsel adequately protects defendants	14
2. The Fourth Circuit's "cause" analysis would undermine the basic premises of our adversarial system	15
3. Courts will be unnecessarily burdened to the prejudice of all litigants if mere attorney error constitutes "cause"	19
4. The holding below frustrates the interests of finality, comity, and federalism	21
II. THE EXHAUSTION REQUIREMENT OF 28 U.S.C. § 2254 APPLIES TO CLAIMS OF ATTORNEY ERROR PROFFERED AS "CAUSE" FOR A PROCEDURAL DEFAULT, AND CARRIER HAS FAILED TO EXHAUST AVAILABLE STATE REMEDIES	23
CONCLUSION	31

TABLE OF AUTHORITIES

CASES	Page
Aillon v. State of Connecticut, 597 F. Supp. 158 (D. Conn. 1984)	12
Alcorn v. Smith, 724 F.2d (6th Cir. 1983)	25
Anderson v. Harless, 459 U.S. 4 (1982)	29
Arnold v. Wainwright, 516 F.2d 964 (5th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976)	17
Briley v. Bass, 584 F. Supp. 807 (E.D. Va. 1984)	13
Brown v. Allen, 344 U.S. 443 (1953)	20
Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), *aff'd*, 754 F.2d 520 (4th Cir. 1985) (en banc)	*passim*
Carrier v. Virginia, 439 U.S. 1076 (1979)	3
Director of the Department of Corrections v. Jones, ___ Va. ___, 329 S.E.2d 33 (1985)	29
Duckworth v. Serrano, 454 U.S. 1 (1981)	26
Duren v. Missouri, 439 U.S. 357 (1979)	10
Engle v. Isaac, 456 U.S. 107 (1982)	*passim*
Estelle v. Williams, 425 U.S. 501 (1976)	16, 18
Evitts v. Lucey, ___ U.S. ___, 105 S.Ct. 830 (1985)	16
Ex parte Royall, 117 U.S. 241 (1886)	27
Fay v. Noia, 372 U.S. 391 (1963)	13, 23
Gibson v. Spalding, 703 F.2d 362 (9th Cir. 1983)	12
Hankerson v. North Carolina, 432 U.S. 233 (1977)	9, 10
Harlow v. Commonwealth, 195 Va. 269, 77 S.E.2d 851 (1953)	17
Hart v. Commonwealth, 221 Va. 283, 269 S.E.2d 806 (1980)	17
Hill v. Sielaff, No. 85-0395-R (E.D. Va. June 25, 1985)	12, 13
Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979), *cert. denied*, 445 U.S. 933 (1980)	11
Johnson v. Zerbst, 304 U.S. 458 (1938)	23
Jones v. Barnes, 463 U.S. 745 (1983)	16

Table of Authorities Continued

Page

Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) (en banc), *cert. denied*, 104 S.Ct. 2356 (1984) 16

Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) 12

Lee v. Missouri, 439 U.S. 461 (1979) 10

Long v. McKeen, 722 F.2d 286 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1608 (1984) 11

Lopez v. Landon, C.A. No. 84-1048-AM (E.D. Va. June 25, 1985) 13

Marks v. Estelle, 691 F.2d 730 (5th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983) 11

McMann v. Richardson, 397 U.S. 759 (1970) 15

Miller v. Bordenkircher, 764 F.2d 245 (4th Cir. 1985) .. 21

Mullaney v. Wilbur, 421 U.S. 684 (1975) 9, 10

Nutall v. Greer, ____ F.2d ____, 37 Cr.L. 2283 (7th Cir. June 11, 1985) 12

Palmes v. Wainwright, 725 F.2d 1511 (11th Cir.), *cert. denied*, 105 S.Ct. 227 (1984) 12

Picard v. Conner, 404 U.S. 270 (1971) 25, 29

Rice v. Commonwealth, 212 Va. 778, 188 S.E.2d 196 (1972) 17

Rose v. Lundy, 455 U.S. 509 (1982) 13, 24, 25, 26, 27

Runnels v. Hess, 653 F.2d 1359 (10th Cir. 1981) 12

Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975) 4, 27, 28

Slayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1973) 29

Stokes v. Warden, 226 Va. 111, 306 S.E.2d 882 (1983) 14, 29

Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052 (1984) 5, 14, 15, 19, 29, 31

Thomas v. Auger, 738 F.2d 936 (8th Cir. 1984) 12

Table of Authorities Continued

	Page
Trent v. Commonwealth, 155 Va. 1128, 156 S.E. 567 (1931)	17
Tsirizotakis v. LeFevre, 736 F.2d 57 (2d Cir.), *cert. denied*, 105 S.Ct. 216 (1984)	11
United States v. Brown, 663 F.2d 229 (D.C. Cir. 1981) (en banc)	12
United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982)	12
United States v. Cronic, ____ U.S. ____, 104 S.Ct. 2039 (1984)	14, 15
United States v. Decoster, 624 F.2d 196 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944 (1979)	18
United States v. Frady, 456 U.S. 152 (1982)	10, 11
United States ex rel. Winters v. DeRobertis, 568 F. Supp. 1484 (N.D. Ill. 1983)	25, 26
Virginia Department of Corrections v. Clark, 227 Va. 525, 318 S.E.2d 399 (1984)	29
Wainwright v. Sykes, 433 U.S. 72 (1977)	*passim*
Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963)	19
CONSTITUTIONAL PROVISIONS	
Fourteenth Amendment of The United States Constitution	4
Sixth Amendment of The United States Constitution	*passim*
STATUTES AND RULES	
28 U.S.C. § 1254(1) (1982)	2
28 U.S.C. § 2254 (1982)	2, 4, 6, 7, 23, 26, 27, 29
Section 8.01-654(B)(2), Code of Virginia	2, 29
Rule 5:17(c), Rules of the Supreme Court of Virginia	2
Rule 5:21, Rules of the Supreme Court of Virginia	2

Table of Authorities Continued

	Page
Rule 5:25, Rules of the Supreme Court of Virginia	2
OTHER AUTHORITIES	
Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963)	21
Bureau of Justice Statistics, Special Report, U.S. Dep't. of Justice, *Federal Review of State Prisoner Petitions - Habeas Corpus* (March, 1984)	20
Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970)	23
Widener, *Fourth Circuit Review, Forward: The Impact of Judicial Decision-Making*, 37 Wash. & Lee L. Rev. 373 (1980)	20

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BRIEF ON BEHALF OF PETITIONER

OPINIONS BELOW

The per curiam 5-4 opinion[1] of the en banc Court of Appeals is reported at 754 F.2d 520 and appears in the Petition Appendix at pages 1-2. The majority opinion of the

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[1]Judges J. Harvie Wilkinson, III, and Emory M. Sneeden were appointed to the Fourth Circuit after this case was argued, and they did not participate in the decision.

panel[2] of the Court of Appeals, adopted by the en banc majority as the basis for its decision, is reported at 724 F.2d 396 and is included at pages 3-15 of the Petition Appendix.

JURISDICTION

The judgment of the panel majority of the Court of Appeals was entered on December 27, 1983. (Pet. App. 3). The en banc opinion, on rehearing, was entered on February 7, 1985. (Pet. App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The relevant statutory provisions are 28 U.S.C. § 2254 and Virginia Code § 8.01-654. Section 2254 is reproduced at App. 29 of the Petition Appendix. Section 8.01-654 is reproduced in the Joint Appendix at 17-18.

Rule 5:21 of the Rules of the Supreme Court of Virginia, at the time of Carrier's criminal trial and direct appeal,[3] provided:

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[2]One of the two majority members of the panel was the Honorable Charles E. Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, sitting by designation. (Pet. App. 3).

[3]The substance of former Rule 5:21 is now contained in essentially the same form in Rules 5:17(c) and 5:25.

> The petition for appeal shall contain assignments of error and the form, contents and length of the petition for appeal shall conform in all respects to the requirements of the appellant's opening brief. Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below. An assignment of error which merely states that the judgment is contrary to the law and the evidence is not sufficient.

STATEMENT OF THE CASE

The respondent, Clifford W. Carrier, was convicted of rape and abduction in March, 1977. Prior to trial, counsel for respondent moved for discovery of the victim's statements. The judge examined the statements, found that they were not exculpatory, and denied the motion. Carrier's counsel requested the statements again immediately before trial, but the judge denied the request for the same reason. The statements were ordered sealed, and counsel formally objected to the trial court's ruling. (Pet. App. 5).

Carrier's notice of appeal to the Virginia Supreme Court assigned as error, *inter alia*, the trial court's ruling prohibiting defense counsel from examining the statements, either prior to or during the trial. Carrier, however, abandoned this discovery claim in his petition for appeal. In April, 1978, the Supreme Court of Virginia refused Carrier's petition for appeal. (J.A. 4). His petition to this Court for writ of certiorari was denied on January 8, 1979. *Carrier v. Virginia*, 439 U.S. 1076 (1979).

On February 5, 1980, Carrier filed a habeas corpus petition in state circuit court, alleging that withholding the victim's statements from trial counsel was a denial of due process under the Fourteenth Amendment. The circuit court dismissed the petition because Carrier had failed to pursue this claim on direct appeal.[4] The Virginia Supreme Court affirmed the circuit court's dismissal of the petition in an unpublished order dated June 12, 1980. (J.A. 7).

In September, 1980, Carrier filed a habeas corpus petition, under 28 U.S.C. § 2254, in the United States District Court for the Eastern District of Virginia. He alleged that he was denied due process because the prosecution deliberately withheld the victim's statements from defense counsel and because the trial court denied his discovery request. The Commonwealth moved to dismiss the petition, arguing that (1) failure to raise these issues on direct appeal barred collateral attack under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and (2) Carrier had not exhausted state remedies.[5] In August, 1982, the United States Magistrate recommended dismissal of the petition on the basis of Carrier's procedural default in failing to raise his claim on direct appeal. Carrier then filed a "Motion of Objection and Exception" to the Magistrate's report, arguing that his procedural

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[4]Under Virginia law, only errors asserted in the petition for appeal will be noticed by the Virginia Supreme Court. (Va. S.Ct. R. 5:21). While Carrier did assign the discovery issue as error in his notice of appeal, he neither assigned nor briefed it in his petition for appeal. Errors that could have been raised on appeal generally may not be raised for the first time in collateral post-conviction proceedings. *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975).

[5]As pointed out by the Court of Appeals below, the Commonwealth anticipated that in amended pleadings Carrier might assert ineffectiveness of counsel as the cause for omitting his claim on direct appeal. (Pet. App. 6).

default should be excused "due to ineffective assistance of counsel . . . ." (J.A. 11).

In October, 1982, the District Court approved the Magistrate's report and held that the discovery claim was barred by procedural default. (Pet. App. 27-29). The District Court also stated that Carrier must establish "cause" for the procedural default, "in the first instance," in the Virginia state courts. (Pet. App. 28).

Carrier appealed to the United States Court of Appeals for the Fourth Circuit. In his brief, he asserted ineffective assistance of counsel as "cause" to excuse the procedural bar under *Wainwright v. Sykes*. (Pet. App. 23-25). He argued that his attorney's failure to pursue the discovery issue on appeal also constituted ineffective assistance of counsel in violation of the Sixth Amendment. (Pet. App. 23). This Sixth Amendment claim was expressly abandoned, however, at oral argument in the Court of Appeals.[6] *See* 724 F.2d at 400. (Pet. App. 9).

On December 27, 1983, a panel of the Court of Appeals, in a 2-1 decision, reversed the District Court's order and remanded the case for further proceedings. The panel stated that the central issue was whether a single act or omission by counsel, insufficient by itself to contravene the Sixth Amendment, may satisfy the "cause" prong in *Sykes* thereby permitting substantive consideration of a claim not previously raised. (Pet. App. 9). The panel then held that "attorney error short of wholesale ineffectiveness of counsel can constitute [*Sykes*] cause, provided that the act or omis-

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[6]Nevertheless, Carrier has pointed out in this Court that he has not conceded that he could not show ineffectiveness of his appellate counsel under the standard of *Strickland v. Washington*, ____ U.S. ____, 104 S. Ct. 2052 (1984), should he choose to seek relief on that basis. (Br. Opp. 4 n.*).

sion resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy." (Pet. App. 11-12). The panel defined attorney error as the failure of trial counsel to exercise judgment, through ignorance or oversight, "in dereliction of the duty" to represent the client. (Pet. App. 12).

The panel also held that the District Court erred in ruling that Carrier must first present his claim of attorney error to the state courts. "The exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of [*Sykes*] cause and prejudice." (Pet. App. 14). The panel remanded the case for the District Court to determine (1) "cause"—whether counsel's failure to appeal the discovery claim was in fact attorney error or a strategic act by counsel—and (2) "prejudice" under *Sykes*. (Pet. App. 15).

Judge Hall, in his dissent, found no basis for remand because petitioner had not alleged any prejudice, and because the alleged attorney error could not constitute *Sykes* "cause." He observed that "[u]nder the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under [*Sykes*]), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the [*Sykes*] bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule." (Pet. 20). Judge Hall also noted that the alleged attorney error should have been raised in Carrier's state habeas petition and, "even if petitioner could prove cause and prejudice under the [*Sykes*] exception, the case still must be dismissed for failure to exhaust state remedies." (Pet. App. 22).

On February 7, 1985, the en banc court adopted the panel majority's decision in a 5-4 per curiam opinion. The four

dissenting judges, including Judge Hall, adopted the panel dissent. (Pet. App. 2).

On July 1, 1985, this Court granted Virginia's petition for a writ of certiorari to consider (1) whether attorney error, not rising to the level of ineffective assistance of counsel, constitutes "cause" under *Wainwright v. Sykes*, and (2) whether the exhaustion requirement is applicable to a claim of attorney error which is asserted as "cause" but not as an independent ground for habeas corpus relief. ____ U.S. ____, 105 S.Ct. 3523 (1985).

SUMMARY OF ARGUMENT

The decision of the court below that attorney error not amounting to ineffective assistance of counsel can constitute "cause" under *Wainwright v. Sykes*, 433 U.S. 72 (1977), is irreconcilable with prior decisions of this Court. A criminal defendant's right to a fair trial is adequately protected against harm flowing from attorney error by the Sixth Amendment right to the effective assistance of counsel. The contrary conclusion reached by the court below is inimical to our adversarial system of criminal justice, and if not reversed by this Court, will unnecessarily exacerbate the burden upon the lower federal courts, and frustrate the interests of finality, comity, and federalism which *Sykes* was intended to foster.

A state prisoner who petitions a federal court for a writ of habeas corpus should not be permitted to circumvent the exhaustion requirement of 28 U.S.C. § 2254 merely by changing the label on his claim of attorney error. Whether the claim of attorney error is asserted as a Sixth Amendment violation or as mere ignorance or inadvertence, if the assertion of attorney error is essential to the habeas petitioner's claim for relief, as it is here, the principles which form the basis of the exhaustion requirement dictate that

the issue of attorney error must first be presented to the state courts. Thus, the court below erred in ruling that the exhaustion requirement is inapplicable to a claim of attorney error when it is asserted as cause for a procedural default rather than as an independent claim for relief.

In the instant case, it is undisputed that Carrier has never presented his claim of attorney error, in any form, to the Virginia courts. Since under Virginia law attorney error of sufficient magnitude is recognized as cause for a procedural default, Carrier has an available state remedy which he has not exhausted.

ARGUMENT

I.

ATTORNEY ERROR NOT CONSTITUTING SIXTH AMENDMENT INEFFECTIVENESS OF COUNSEL IS NOT "CAUSE" UNDER *WAINWRIGHT V. SYKES* TO EXCUSE PROCEDURAL DEFAULT.

A. Prior decisions of this Court compel the conclusion that mere attorney error is not "cause."

Settled precedents of this Court control this case. Those precedents require rejection of Carrier's argument that mere attorney error is sufficient "cause" on federal collateral review to excuse a procedural default in the state courts. The Fourth Circuit's conclusion that non-tactical attorney error may constitute adequate "cause" is wholly at odds with the sound reasoning of those decisions.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court held that a state prisoner who procedurally defaults by failing to comply with a state's contemporaneous objection rule is barred from obtaining federal habeas corpus review of the claim, unless he can show cause for the default and actual prejudice. 433 U.S. at 87. Subsequently, in *Engle v. Isaac*, 456 U.S. 107 (1982), the Court had occasion to consid-

er the adequacy of an assertion of "cause." The procedural default in that case was defense counsel's failure to object to a burden-shifting jury instruction. The Court said:

> We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have *overlooked* or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will *recognize* and raise every conceivable constitutional claim. *Where the basis of a constitutional claim is available*, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged *unawareness* of the objection as cause for a procedural default.

456 U.S. at 134 (emphasis added). The Court also noted that in a procedural default situation "[c]ounsel's default may stem from simple ignorance or the pressures of trial." *Id.* at 129 n.34. Nevertheless, the Court found that "cause" had not been established. The Fourth Circuit's holding below is directly contrary to the reasoning of *Isaac*.

Other decisions of this Court also compel the conclusion that mere attorney error does not constitute "cause." For example, in *Hankerson v. North Carolina*, 432 U.S. 233 (1977), the Court held *Mullany v. Wilbur*,[7] which proscribed requiring a criminal defendant to negate any ele-

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[7]421 U.S. 684 (1975).

ment of the offense, to be fully retroactive. Rejecting the State's plea that retroactivity could have dire consequences, the Court said:

> If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then *it is unlikely that prior to Mullaney many defense lawyers made appropriate objections* to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.*

432 U.S. at 244 n.8 (emphasis added).

It is difficult to conceive of a tactical or strategic reason for not objecting to an improper burden-shifting instruction. Such a failure in virtually all instances would be the result of attorney error or oversight. Therefore, the Fourth Circuit's holding in this case that inadvertent "attorney error" or error emanating from ignorance constitutes "cause" under *Sykes* is squarely irreconcilable with the reasoning of *Hankerson*.[8] *See also Isaac*, 456 U.S. at 134 n.43.

This Court's decision in *United States v. Frady*, 456 U.S. 152 (1982), also demonstrates that mere attorney error cannot constitute "cause." On collateral attack of his federal murder conviction, Frady contended that erroneous jury instructions relieved the prosecution of the burden of proving malice, an element of the offense. He asserted that the

[8]Additionally, in *Lee v. Missouri*, 439 U.S. 461, 462 (1979), this Court indicated that *Wainwright v. Sykes* could insulate convictions from the retroactive application of *Duren v. Missouri*, 439 U.S 357 (1979), which invalidated certain automatic statutory exemptions from jury service.

"plain error" rule allowed for review of his objection despite his procedural default in not objecting at trial or on direct appeal. This Court rejected his argument and held that the "plain error" standard is "out of place" when a prisoner launches a collateral attack on his conviction after society's legitimate interest in the finality of the judgment has been perfected by affirmance of the conviction on direct appeal. 456 U.S. at 164. *See also Isaac*, 456 U.S. at 134-135.

Even on a federal direct appeal, recourse may be had to the "plain error" exception "only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Frady*, 456 U.S. at 163. Negligence, ignorance or inadvertence on the part of defense counsel certainly must be assumed under such circumstances. *A fortiori*, on collateral review of a state conviction, where considerations of comity and federalism are involved, such attorney negligence, ignorance or inadvertence cannot be "cause" to excuse a procedural default.[9]

[9]Most federal circuits which have addressed the question now appear to have rejected the kind of reasoning applied by the Fourth Circuit in the instant case. *See, e.g., Tsirizotakis v. LeFevre*, 736 F.2d 57, 62 (2d Cir.), *cert. denied*, 105 S.Ct. 216 (1984) (if acts or omissions of counsel are asserted as "cause" under *Sykes*, they must amount to ineffectiveness of counsel "of constitutional dimensions"); *Indiviglio v. United States*, 612 F.2d 624, 631 (2d Cir. 1979), *cert. denied*, 445 U.S. 933 (1980) ("requirement of showing cause would effectively be eliminated" if the court accepted defense counsel's neglect as "cause"); *Marks v. Estelle*, 691 F.2d 730, 735 (5th Cir. 1982), *cert. denied*, 462 U.S. 1120-1121 (1983) (rejecting as "cause" the attorney's failure to investigate and discover the inadmissibility of certain evidence, because this "would effectively eliminate any requirement of showing cause at all"); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1608 (1984) (attorney's ignorance of the law or a mistake in judgment, "including . . . an irrational belief that raising a particular claim would confuse a jury" is not "cause");

Carrier argues that the Fourth Circuit's "standard" in this case does not accept all attorney error as "cause" but only indicates that, under "some circumstances," such error may be "cause." He suggests that the Court had "in mind quite a serious error and by no means a rule . . . that ignorance alone constitutes *Sykes* cause." (Br. Opp. 7). If this interpretation is correct, then the Fourth Circuit has provided no meaningful and workable standard at all.[10]

Nutall v. Greer, ____ F.2d ____, 37 Cr.L. 2283 (7th Cir. June 11, 1985) (mere neglect in failing to appeal an issue is not "cause"); *Thomas v. Auger*, 738 F.2d 936, 939 (8th Cir. 1984) (defense counsel's non-tactical failure to raise a claim, due to negligence, is not "cause"); *Palmes v. Wainwright*, 725 F.2d 1511, 1525 (11th Cir.), *cert. denied*, 105 S.Ct. 227 (1984) (defense attorney's "ignorance of the facts" or non-tactical failure to object to arrest was not "cause"). *Cf. United States v. Brown*, 663 F.2d 229, 231-232 (D.C. Cir. 1981) (en banc) (where defense counsel decided an objection would not be successful and his failure to object "did not fall below the level of effective assistance of counsel, . . . there was no 'cause'" to excuse the default at the federal trial). *But see* (pre-*Isaac* cases) *Runnels v. Hess*, 653 F.2d 1359, 1363-1364 (10th Cir. 1981); *Jurek v. Estelle*, 593 F.2d 672, 682-683 (5th Cir. 1979), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). The question appears to have been noted but left undecided in the Third and Ninth Circuits. *See United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 443-444 (3d Cir. 1982); *Gibson v. Spalding*, 703 F.2d 362 (9th Cir. 1983).

[10]One federal district court recently concluded that, while *Carrier* says the test for cause is a lesser showing than a Sixth Amendment violation, "just what that lesser showing may be remains unclear." The court found that it was "[l]eft without an articulated standard." After finding that counsel's error was "inadvertent," the court relied on the Sixth Amendment test of effective assistance of counsel and denied the habeas petition. *Aillon v. State of Connecticut*, 597 F. Supp. 158, 164 (D. Conn. 1984). It appears that some federal district courts are finding it easier to address the merits of a habeas petitioner's claims than to grapple with the *Carrier* standard. *See, e.g., Hill v. Sielaff*, No. 85-0395-R, slip. op. at 2 (E.D. Va. June 25, 1985) ("Assuming, *arguendo*, that counsel's failure to object . . . was based

Moreover, the courts that have applied *Carrier* have not understood the decision to be that narrow.[11] That *Carrier* should be read so broadly is not surprising in view of the Fourth Circuit's explicit statement: "Assuming his attorney acted out of ignorance or inadvertence—which remains for the district court to determine—Carrier *has met* the [*Sykes*] cause requirement." 724 F.2d at 402 n.7. (Pet. App. 13 n.7, emphasis added).

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on unpreparedness or ignorance of law, *Carrier v. Hutto* . . ., this Court will briefly address the merits of petitioner's argument.")(Copies of this unpublished decision have been lodged in the Clerk's Office of this Court).

[11]For example, in *Briley v. Bass*, 584 F. Supp. 807, 817-818 (E.D. Va. 1984), the court indicated that under *Carrier*, simple ignorance or oversight of counsel would be "cause." Also, in addition to the similar interpretation suggested in *Hill v. Sielaff* (see footnote 10, *supra*), a federal district court recently held that under *Carrier* a habeas petitioner had shown "cause" for failing to raise all claims in his first state habeas petition as is generally required by state law. The court said, "If attorney error resulting from ignorance can constitute "cause" for a procedural default, *see Carrier v. Hutto* . . . , then certainly the ignorance of a *pro se* petitioner would be just as excusable." *Lopez v. Landon*, C.A. No. 84-1048-AM, slip. op. at 2 (E.D. Va. June 25, 1985) (copies lodged in the Clerk's Office of this Court). While, as Justice Blackmun noted in his concurring opinion in *Rose v. Lundy*, 455 U.S. 509, 525 n.2 (1982), a state "may adopt a rule directing defendants to present all their claims at one time" and a default under such a rule "would bar subsequent federal habeas corpus relief on additional grounds," under the *Carrier* rationale, at least as it is being applied by lower courts, only deliberate tactical defaults would be an enforceable bar. This Court pointed out in *Engle v. Isaac*, however, that a "decision to withhold a known constitutional claim resembles the type of deliberate bypass condemned in *Fay v. Noia*, 372 U.S. 391 (1963)," and that the "cause-and-prejudice standard is more demanding than *Fay's* deliberate bypass requirement. . . . " *Isaac*, 456 U.S. at 131 n.36.

B. Sound reasons support the conclusion that mere attorney error is not "cause."

1. The right to effective assistance of counsel adequately protects defendants.

When a criminal defendant points to inadequacies or errors of his attorney as an essential ground for securing relief, the Sixth Amendment right to effective assistance of counsel should provide the analytical framework rather than *Wainwright v. Sykes*. A criminal defendant is entitled to habeas corpus relief for mistakes of his attorney which are outside the range of reasonably effective assistance of counsel and deprive him of a fair trial. *See Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984). This clear, workable standard does not leave a criminal defendant without an adequate remedy. Even a single error or omission can be so serious that a finding of ineffective assistance of counsel in violation of the Sixth Amendment is warranted. *United States v. Cronic*, ___ U.S. ___, 104 S.Ct. 2039, 2046 n.20 (1984).

For example, the Supreme Court of Virginia recently held that a trial attorney rendered ineffective assistance solely because he failed to object to a jury instruction invalidated seven months earlier by this Court. The Virginia Court said, "We are of opinion that a reasonably competent attorney in a criminal case would have known of a Supreme Court decision relating to such a fundamental right of an accused and would have objected to the instruction." *Stokes v. Warden*, 226 Va. 111, 118, 306 S.E.2d 882, 885 (1983).[12]

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[12]*Stokes* did not grant the petitioner a new trial because actual prejudice was not shown under the facts and circumstances of that case. 226 Va. at 118-119, 306 S.E.2d at 885-886.

A criminal defendant is guaranteed reasonably competent counsel, not infallible counsel. He assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. *See McMann v. Richardson*, 397 U.S. 759, 774 (1970). Fundamental fairness is not undermined unless counsel's error falls below an objective standard of reasonableness. *Strickland*, 104 S.Ct. at 2065. Nothing more should be required.

2. The Fourth Circuit's "cause" analysis would undermine the basic premises of our adversarial system.

The decision below has authorized a much broader and more intrusive inquiry into attorney performance than is generally necessary to determine allegations of ineffective assistance of counsel. In assessing a Sixth Amendment claim, a reviewing court must indulge a strong presumption that counsel's act or omission was a product of reasonable professional judgment. Unless the prisoner alleges facts which, if true, would overcome that presumption, no hearing is required. *Strickland*, 104 S.Ct. at 2066. The Fourth Circuit, however, has indulged a presumption that counsel's failure to appeal the discovery claim was the result of ignorance or inadvertence and has ordered the district court to conduct a hearing at which counsel's thought processes will be explored. (Pet. App. 14-15). Such an approach is inimical to our adversarial process.

The American adversarial system operates on the assumption that truth is best ascertained and justice is best secured through a process in which each party has the responsibility of developing and presenting its case to an impartial tribunal. *See Cronic*, 104 S.Ct. at 2045. Criminal defendants entrust their liberty to the skill of their attorneys every day. Except for certain fundamental matters

requiring a personal decision by the defendant,[13] the consequences of the attorney's acts and omissions fall upon the defendant. Provided the lawyer has afforded his client reasonably effective assistance of counsel, there is nothing untoward or inappropriate in this circumstance. *See Jones v. Estelle*, 722 F.2d 159, 165 (5th Cir. 1983) (en banc), *cert. denied*, 104 S.Ct. 2356 (1984). Indeed, "the representative character of the relationship between a lawyer and his client will tolerate no other result."[14] *Id.* at 165. *See also Sykes*, 433 U.S. at 89, at 91 (Burger, C.J., concurring), at 94 (Stevens, J., concurring); *Estelle v. Williams*, 425 U.S. 501, 512 (1976).

The possibility of State Bar sanctions against defense counsel is no substitute for enforcement of procedural default rules. In the vast majority of the default situations encompassed by *Carrier*, defense counsel will have been diligent and constitutionally effective, but not perfect or infallible. Sanctions against counsel in those situations would be both unrealistic and inappropriate.[15] Of course, the

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[13]Such basic decisions include "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . . ." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). In these fundamental areas the defendant is not bound by his attorney's acts if he has not concurred in them.

[14]In the appellate context, this Court recently recognized this principle by holding that it is for counsel to decide which nonfrivolous claims should be pursued on direct appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). In *Barnes* the Court did not have occasion to decide whether counsel's *refusal* to raise a claim specifically *requested* by the appellant would constitute "cause" under *Wainwright v. Sykes*. *See Barnes*, 463 U.S. at 754 n.7. That question is likewise not before the Court in this case.

[15]In *Evitts v. Lucey*, ____U.S. ____, 105 S.Ct. 830, 837 (1985), this Court indicated that sanctions against the attorney rather than the defendant would be effective to protect the States' interest in enforcing their procedural default rules. In *Evitts*, however, the defense attorney was found to have provided ineffective assistance of counsel which had caused the defendant to forfeit his direct appeal.

purpose of enforcing procedural default rules is not to punish the defendant or his lawyer but to allow for the orderly and efficient administration of justice by the courts. *See Trent v. Commonwealth*, 155 Va. 1128, 1138, 156 S.E. 567, 570 (1931). *See also Harlow v. Commonwealth*, 195 Va. 269, 273, 77 S.E.2d 851, 853-854 (1953). These rules apply to the prosecution as well as the defendant. *See, e.g., Hart v. Commonwealth*, 221 Va. 283, 289-290, 269 S.E.2d 806, 810-811 (1980); *Rice v. Commonwealth*, 212 Va. 778, 188 S.E.2d 196 (1972).

Procedural rules regulating judicial proceedings are effective only if one presumes an identity of interest between lawyer and client. Such rules induce attorneys to vigorously investigate, carefully evaluate, and timely raise objections and issues. *See Arnold v. Wainwright*, 516 F.2d 964, 971 and n.12 (5th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976). It would be anomalous to grant a habeas petitioner a federal forum for his claims virtually as a reward for the deficiencies of his defense at the state level. In a very real sense, however, this is what the Fourth Circuit approach would require.

Allowing mere attorney error to constitute "cause" would largely negate procedural rules by opening a breach through which almost any defaulting petitioner could pass. No longer would the state trial be the "main event," *see Sykes*, 433 U.S. at 91, but rather the focus would shift to collateral proceedings in federal court.

Other problems are also apparent. If, in order to secure federal enforcement of state procedural default rules, it must be established that defense counsel made a reasonable tactical decision not to raise a particular issue, prosecutors would be well advised and certainly motivated to oversee the acts and apparent omissions of defense counsel. Only by making detailed inquiries about, and a meticulous record of, defense tactics could the prosecutor in some measure protect the conviction. Because the defense may well choose

not to reveal its strategy as the case progresses, the prosecutor's task would be a difficult one at best. Ascertaining and establishing a record of defense counsel's motivations at the appellate level would be virtually impossible, except by presenting evidence at a subsequent habeas corpus proceeding.

Neither prosecutorial nor judicial supervision of defense counsel's performance is generally desirable from anyone's point of view. As the United States Court of Appeals for the District of Columbia Circuit has perceptively stated regarding "ineffectiveness of counsel" claims:

> For the law to encourage a wide-ranging inquiry, even after trial, into the conduct of defense counsel would undercut the fundamental premises of the trial process and transform its essential nature. The resulting upheaval in the role of the trial judge, widely recognized as a serious difficulty, would in itself call into question any broad doctrine of ineffective assistance. And the prosecution in a criminal case would in turn ask to oversee defense counsel's conduct at trial—to ensure against reversal.
>
> An even more difficult problem would be posed by the supervision of defense counsel's development of the case before trial. Even if we had the authority, it would be unwise to embark upon a doctrine that would open the door to a fundamental reordering of the adversary system into a system more inquisitorial in nature. The adversary system, warts and all, has worked to provide salutary protection for the rights of the accused. Efforts to improve the performance of defense counsel should not imperil that protection.

United States v. Decoster, 624 F.2d 196, 208-209 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944 (1979) (footnotes omitted). *See also Williams*, 425 U.S. at 512.

Adoption of the Fourth Circuit's rule would foster the very problems this Court hoped to avert in *Strickland:* "Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense." 104 S.Ct. at 2066. "The availability of intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges." *Id.* Also, "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Strickland,* 104 S.Ct. at 2066.

3. Courts will be unnecessarily burdened to the prejudice of all litigants if mere attorney error constitutes "cause."

Habeas corpus "shadow trials" of defense counsel's performance will proliferate under the standard adopted below. Every time an attorney has not objected at trial or raised an issue on appeal the defendant can assert in habeas corpus proceedings that it was the result of attorney error.[16] Fact-finding specifically focused upon counsel's motivations would be required to distinguish between tactical decisions and inadvertence, ignorance or negligence. If "cause" is established, a second hearing may be necessary to explore the merits of the defaulted claims. This will only exacerbate the already serious burden of litigation on the federal courts.

In balancing the utility of *expanding* the availability of federal habeas corpus review to state prisoners against the burden on the judicial system that such an expansion would

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[16]Prisoners "do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court." *Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir. 1963) (Duniway, J., concurring).

create, it should be recognized that in the past twenty years there has been a staggering increase (nearly 700%) in filings of state prisoner habeas corpus petitions in federal court. *See* Bureau of Justice Statistics, Special Report, U.S. Dep't. of Justice, *Federal Review of State Prisoner Petitions—Habeas Corpus* at 1-2 (March, 1984) (hereinafter "*Special Report*").[17] Despite this flood of habeas petitions, the data show that only a very small number have resulted in dispositions favorable to the prisoners.[18] And it is not only the public and judiciary that suffer from the explosion of habeas corpus litigation. As the late Justice Jackson observed, "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown v. Allen*, 344 U.S. 443, 537 (1953). Judge Widener of the United States Court of Appeals for the Fourth Circuit has recently echoed that sentiment. He pointed out that "the barrage of suits filed by prisoners who flout the judicial system may in the end do the greatest harm to those prisoners having meritorious claims, which may be lost in the shuffle of the constantly growing fill of cases." Widener, *Fourth Circuit Review, Forward: The Impact of Judicial Decision-Making*, 37 Wash. & Lee L. Rev. 373, 374 (1980).

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[17]The statistics themselves do not reveal the full impact of the added case load. "Habeas corpus actions are somewhat different from other civil actions in that they may require the analysis of a complete court record." *Special Report* at 3 n.2. Furthermore, "[h]abeas corpus actions are also, by virtue of the prisoner status of the petitioners, less likely to be disposed of without court involvement." *Id.* at 3 n.2.

[18]For example, a United States Department of Justice study involving a sample of 1,899 state prisoner habeas petitions filed in federal court between July 1, 1975 and June 30, 1977 found that only 3.2% were granted in whole or in part, and a substantial portion of those did not result in release of the petitioner from custody. *Special Report* at 5.

See also Miller v. Bordenkircher, 764 F.2d 245, 248 (4th Cir. 1985) ("In this crowded courtscape, federal judges cannot be all things to all people.")

An already overburdened judicial system does not need a stimulus for additional habeas corpus hearings and litigation. But an acceptance of the Fourth Circuit's definition of "cause" would be just such a stimulus. Everyone would suffer from the resulting burden on the courts.

4. The holding below frustrates the interests of finality, comity, and federalism.

This Court has recognized that while "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence," it also "entails significant costs." *Isaac*, 456 U.S. at 126 (footnote omitted). Those costs have been well articulated by the Court. By extending "the ordeal of trial for both society and the accused," collateral review of a criminal conviction "undermines the usual principles of finality of litigation." 456 U.S. at 127. *See also* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). "Liberal allowance of the writ . . . degrades the prominence of the trial itself," and issuance of the writ "frequently cost[s] society the right to punish admitted offenders." *Isaac*, 456 U.S. at 127. Finally, because "[f]ederal intrusions into state criminal trials frustrate both the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights," the writ of habeas corpus "imposes special costs on our federal system." 456 U.S. at 128.

When a procedural default "has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts," the costs exacted by allowing federal habeas review "are particularly high." *Isaac*, 456 U.S. at 128. This is so

because "the trial court has had no opportunity to correct the [alleged] defect . . . .," "[t]he defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum," *id.* (footnote omitted), "[*t*]*he state appellate courts have not had a chance to mend their own fences and avoid federal intrusion*," and issuance of the writ undercuts "*the State's ability to enforce its procedural rules*." 456 U.S. at 129 (emphasis added).

In *Sykes*, this Court established the "cause" and "prejudice" tests which a state prisoner who has procedurally defaulted in the state courts must satisfy before he can obtain federal habeas review of his claims. 433 U.S. at 87. Those tests were designed to minimize the costs exacted by the issuance of a writ of habeas corpus where the state courts have been denied the opportunity, by the prisoner's procedural default, to decide the merits of his claims. 433 U.S. at 88-90. The effect of the Fourth Circuit's ruling in the present case, however, is to dramatically lower the "cause" standard to a point where it is rendered meaningless. As Judge Hall perceptively observed in his dissent to the decision below: "Under the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under [*Sykes*]), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the [*Sykes*] bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule." (Pet. App. 20). By establishing a "cause" standard that practically any defaulting petitioner could meet, the decision of the court below necessarily frustrates the interests of finality, comity, and federalism that this Court has sought to foster and protect.

The "cause and prejudice" standard of *Wainwright v. Sykes* has done much to expedite habeas cases and advance

the interests it was designed to foster. The *Sykes* doctrine has resulted in the federal courts according needed respect to the States' reasonable procedural rules—in sharp contrast to the pre-*Sykes* days of *Fay v. Noia*, 372 U.S. 391 (1963). Under the sweeping rule of *Fay*, only one who "deliberately bypassed" the orderly procedure of the state courts forfeited his claim for federal review. 372 U.S. at 438. To find such a bypass, the state had to show that the habeas applicant "after consultation with competent counsel or otherwise, understandingly and knowingly" waived his claim by "'an intentional relinquishment or abandonment of a known right or privilege.'" *Fay*, 372 U.S. at 439, *citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), as "the controlling standard."

Realistically, it is seldom possible for the state to meet such a standard. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 158 (1970). Thus, it comes as no surprise that the number of cases finding a deliberate bypass under the *Fay* test is quite small. The standard set by the Fourth Circuit in *Carrier*, like the standard of *Fay* amounts as a practical matter to a nearly total invalidation of state procedural default rules. *Sykes* was a great step in the right direction. The decision below, however, is a major step backwards.

II.

THE EXHAUSTION REQUIREMENT OF 28 U.S.C. § 2254 APPLIES TO CLAIMS OF ATTORNEY ERROR PROFFERED AS "CAUSE" FOR A PROCEDURAL DEFAULT, AND CARRIER HAS FAILED TO EXHAUST AVAILABLE STATE REMEDIES.

The Fourth Circuit held below that "[t]he exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims of habeas relief, not to the proffer of *Sykes* cause and

prejudice."[19] 724 F.2d at 402. (Pet. App. 14). The conclusion that the exhaustion requirement is inapplicable to a proffer of attorney error as *Sykes* "cause," if accepted by this Court, would have a significantly adverse effect upon federal-state comity and upon the workload of the federal courts. If a habeas petitioner complains about his attorney's performance based upon the attorney's ignorance or inadvertence, then he would have every incentive to simply label his claim as "mere attorney error" rather than "ineffective assistance of counsel," thereby proceeding directly to federal court without ever giving the state courts the opportunity to address the claim.[20] The net result would be a wholesale shift of ineffective counsel claims from the state to the federal courts. Such a result would not only increase the

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[19]Carrier's concession that if Virginia recognized attorney error short of ineffective assistance of counsel as cause for a procedural default, he would be required to exhaust state remedies (Br. Opp. 5, 14), while correct, is fundamentally at odds with this portion of the Fourth Circuit's ruling.

[20]It may be suggested that the decision whether to proceed directly into federal court with an allegation of mere attorney error or to exhaust a possible claim of ineffective assistance of counsel in the state courts should be left to the habeas petitioner. Such a petitioner might argue that it is his right to run the risk, if he so chooses, that by electing not to exhaust his ineffective assistance of counsel claim he may be precluded from raising such a claim in a subsequent federal habeas petition. *See Rose v. Lundy*, 455 U.S. at 520-521. It is difficult to see, however, what risk, if any, a petitioner would run by choosing to proceed directly to federal court with his allegation of mere attorney error. If he is unable to establish that his attorney committed mere error, it is highly unlikely, if not impossible, that in subsequent proceedings he would be able to establish that his attorney's performance fell below the level required by the Sixth Amendment.

number of federal habeas petitions alleging attorney error,[21] but would also undermine the principles of federalism and comity which form the basis of the exhaustion requirement. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Picard v. Conner*, 404 U.S. 270, 275 (1971).

In *Alcorn v. Smith*, 724 F.2d 37 (6th Cir. 1983),[22] the United States Court of Appeals for the Sixth Circuit reasoned that when a federal habeas petitioner had exhausted his substantive claim, but had never presented to the state courts "the substance of his claim that his procedural default should be excused . . . because his counsel was inadequate," the petition must be dismissed for failure to exhaust state remedies. 724 F.2d at 41. The Court of Appeals concluded that the "[c]onsiderations of federalism" which form the basis for the exhaustion requirement permitted no exception to the requirement simply because the claim of attorney error was asserted as *Sykes* "cause" rather than as an independent claim for relief. *Id. See also United States ex rel. Winters v. DeRobertis*, 568 F. Supp. 1484, 1489 (N.D. Ill. 1983).

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[21]Undoubtedly, a number of state prisoners never bring their claims of attorney error to federal court. They either obtain relief in the state courts or they are convinced by the state courts' rejection of their claims that the claims are without merit. Under the *Carrier* rationale, however, so long as the basis for the claim of attorney error is ignorance or inadvertence, a state prisoner would no longer have any reason to bother presenting his claim to the state courts.

[22]This Court granted certiorari in *Alcorn*, 105 S.Ct. 1353, but the judgment of the Sixth Circuit was summarily vacated when the Commonwealth of Kentucky informed this Court that it had been discovered that Alcorn had, in fact, exhausted his claim of attorney error. 105 S.Ct. at 2315.

This Court should not permit the exhaustion requirement to be circumvented merely because a federal habeas petitioner has changed the label on his claim of attorney error. When a claim of ineffective assistance of counsel has never been presented to the state courts, a federal court is not free to grant relief even if it believes that there was a clear constitutional violation. *Duckworth v. Serrano*, 454 U.S. 1 (1981). "[O]bvious constitutional errors, *no less than obscure transgressions*, are subject to the [exhaustion] requirements of § 2254(b) . . . ." 454 U.S. at 4 (emphasis added).

Thus, whether a habeas petitioner alleges a clear-cut violation of the Sixth Amendment, or merely an "obscure transgression" proffered as cause for a procedural default, the state courts must be afforded the first opportunity to address the claim. Such a conclusion is also required by this Court's holding in *Rose v. Lundy* that a federal habeas petition containing *any* unexhausted claim must be dismissed. 455 U.S. at 522. A contrary conclusion, such as that reached by the Fourth Circuit in the present case, would allow a federal court to indirectly address matters which the court could not directly address under *Rose v. Lundy*. *See Winters*, 568 F. Supp. at 1489.

While Carrier has exhausted available state remedies as to his substantive discovery claim by raising it in his state habeas corpus petition and in his subsequent appeal to the Virginia Supreme Court, the Fourth Circuit correctly recognized that a merits review is barred by *Sykes* unless Carrier can show cause and prejudice for his procedural default on direct appeal. *See* 724 F.2d at 399. (Pet. App. 8). Carrier has belatedly asserted that attorney error was the cause of his procedural default. At no time in the courts of Virginia, however, did Carrier ever make such an assertion, even after the state's motion to dismiss put him on notice

that in the absence of an explanation for his default, his claim would be procedurally barred. The first time that Carrier ever made a proffer of cause for his default was in his "Motion of Objection and Exception" to the report of the United States Magistrate which had recommended dismissal of his federal habeas petition. (J.A. 10-11).

A federal habeas corpus petitioner must first exhaust available state remedies before relief can be granted. 28 U.S.C. § 2254(b). The statutory exhaustion requirement codifies the common law. *Rose v. Lundy*, 455 U.S. at 515, *citing Ex parte Royall*, 117 U.S. 241, 251 (1886). A petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).[23]

In *Slayton v. Parrigan*, 215 Va. 27, 205 S.E. 2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), the Supreme Court of Virginia stated that "absent a showing of ineffective assistance of counsel," a non-jurisdictional claim cannot be raised for the first time in a habeas corpus proceeding. 215 Va. at 29, 205 S.E. 2d at 682. If in the present case this Court adopts the position that, in order to constitute "cause" under *Sykes*, the alleged attorney error must rise to the level of ineffective assistance of counsel in violation of the Sixth Amendment, Carrier will clearly have an available state remedy. Indeed, Carrier has conceded in this Court that if attorney error short of ineffective assistance of counsel cannot constitute "cause," he "must return to state court."

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[23]The Fourth Circuit concluded that "since this is not an exhaustion of remedies case, we need not inquire whether any state remedies remain available to Carrier or whether further state proceedings would be futile due to the operation of Virginia law." 724 F.2d at 402 n.8. (Pet. App. 14 n.8).

(Br. Opp. 4). This is so because under Virginia law ineffective assistance of counsel is cause for a procedural default.

If, however, this Court were to accept the Fourth Circuit's conclusion that attorney error short of ineffective assistance of counsel can constitute "cause" under *Sykes*,[24] Carrier would nevertheless have an available state remedy to exhaust. In *Parrigan*, the Virginia Supreme Court recognized that attorney error of sufficient magnitude can excuse a procedural default. 215 Va. at 29, 205 S.E.2d at 682. Although Carrier now insists that for purposes of his proffer of *Sykes* "cause" he is not alleging a Sixth Amendment violation, he has asserted in this Court that his appellate attorney abandoned a "winning . . . argument" (Br. Opp. 6), and that his claim of attorney error may well rise to the level of ineffective assistance of counsel (Br. Opp. 4). When he first raised his claim of attorney error in federal district court he described it as a claim of "ineffective assistance of counsel." (J.A. 11). In his brief filed in the Fourth Circuit he alleged ineffective assistance of counsel, both as *Sykes* "cause" and as an independent Sixth Amendment violation. (Pet. App. 23-25). The Fourth Circuit described counsel's failure to raise the discovery claim on appeal as "inexplicabl[e]" and said that "the likelihood of attorney error appears very great in this case." (Pet. App. 5, 14-15). Under these circumstances, the Virginia courts should be afforded the opportunity to determine, in the first instance, whether Carrier's claim of attorney error, labeled in whatever manner Carrier may choose, is sufficient under Virginia law to excuse his procedural default.

Carrier cannot successfully contend that he has exhausted state remedies by virtue of his prior state habeas

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[24]For the reasons previously stated in Argument I, the Petitioner strenuously urges the Court not to so rule.

proceedings.[25] In order to satisfy the requirement of 28 U.S.C. § 2254, Carrier must have afforded the state courts "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claims." *Anderson v. Harless*, 459 U.S. 4, 6 (1982), *quoting Picard v. Conner*, 404 U.S. 270, 276-277 (1971). He also "must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." *Id.* Since Carrier cannot obtain

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[25]Carrier has correctly conceded that if the Virginia courts were to recognize mere attorney error as cause for a procedural default, "there would be a failure to exhaust in this case." (Br. Opp. 14). Although § 8.01-654(B)(2) of the Virginia Code (J.A. 17) provides generally that "[n]o writ [of habeas corpus] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition," this would not render a return to the state courts futile. Even if, *arguendo*, Carrier knew at the time he filed his *pro se* state habeas corpus petition that his attorney had failed to raise the discovery claim on direct appeal, it is entirely possible that the Virginia courts would not interpret § 8.01-654(B) (2) so as to bar relief. Carrier has asserted that he never alleged attorney error in the state courts as the cause for his procedural default on direct appeal because such a claim could not satisfy the "farce and mockery" test then being applied in Virginia. (Br. Opp. 14). *See Slayton v. Weinberger*, 213 Va. 690, 691, 194 S.E.2d 703, 705 (1973). That, however, is no longer the standard in Virginia. In *Stokes v. Warden*, 226 Va. 111, 306 S.E.2d 882 (1983), the Virginia Supreme Court formally adopted and applied a "reasonably effective assistance" test. Since then, this Court has decided *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052 (1984), and the Virginia Supreme Court has consistently applied the *Strickland* standard. *See Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984); *Director of the Department of Corrections v. Jones*, ____Va. ____, 329 S.E.2d 33 (1985). In view of this change in the applicable standard, and the fact that Carrier filed his state habeas petition *pro se*, if Carrier were required to return to the state forum, the Commonwealth would not assert § 8.01-654(B)(2) as a defense and it is quite possible that the Virginia courts would not apply the statute to bar habeas relief.

federal habeas review of the merits of his discovery claim unless he is able to establish "cause" for his procedural default in the state courts, his assertion of attorney error is a *sine qua non* of his claim for relief. Having never presented his claim of attorney error to the state courts in any form, Carrier has failed to present to those courts the "substance" of his claim for relief, and has thereby failed to satisfy the exhaustion requirement.

CONCLUSION

That mere attorney error does not constitute "cause" under *Wainwright v. Sykes* is compelled not only by prior decisions of this Court but by sound reason. Practically any non-tactical failure to raise an issue can, with benefit of hindsight, be called attorney error. Acceptance of such a standard would allow the exception to swallow the rule.

The *Sykes* doctrine has been very effective in advancing the orderly and efficient administration of justice, the finality of convictions, and the interests of comity and federalism, as it was intended to do. At the same time, however, criminal defendants have been protected from miscarriages of justice resulting from serious attorney mistakes by the Sixth Amendment right to effective assistance of counsel, as articulated in *Strickland v. Washington*. This workable and effective balance would cease if mere attorney error constitutes "cause" under *Sykes*. Indeed, the *Sykes* standard would be eviscerated.

Additionally, Carrier's claims before the Court of Appeals concerning attorney error were never presented to, or considered by, the Virginia courts. Considerations of comity and federalism require that state remedies be exhausted and that the state courts be given the opportunity to decide whether the alleged attorney error rises to the level necessary for the state courts to excuse Carrier's procedural default.

Accordingly, the judgment of the Court of Appeals below was erroneous and must be reversed.

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September 14, 1985